No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Of Counsel:

DENNIS RAPPS
NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS
1290 Avenue of the Americas
New York, NY 10104
(212) 314-6384

DAVID ZWIEBEL
MORDECHAI BISER
AGUDATH ISRAEL OF AMERICA
42 Broadway, 14th Floor
New York, NY 10003
(212) 797-9000

NATHAN J. DIAMENT
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
11 Broadway, 14th Floor
New York, NY 10004
(212) 563-4000

NATHAN LEWIN
Counsel of Record
ALYZA D. LEWIN
LEWIN & LEWIN, LLP
1828 L Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 828-1000

Attorneys for the Amicus Curiae

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS[1]

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[1] The parties have consented to the filing of this brief and copies of the letters of consent are filed with the Clerk. No person, organization or corporation other than the *amicus* and the organizations named herein have assisted in or contributed to the preparation of this brief.

INTEREST OF THE *AMICUS CURIAE*

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. Over the past 37 years, COLPA has filed *amicus curiae* briefs in this Court in 30 cases involving the Religion Clause of the First Amendment.[2]

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[2] *Newdow v. Elk Grove Unified School District*, 124 S.Ct. 2301 (2004); *Locke v. Davey*, 540 U.S. 712 (2003); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Agostini v. Felton*, 521 U.S. 203 (1997); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986); *Ohio Civil Rights Com'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Committee for Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Dewey v. Reynolds Metals Co.*, 402 U.S 689 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970); *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).

COLPA submits this *amicus* brief on behalf of, and is joined by, the following seven national Orthodox Jewish organizations:

- Agudas Harabonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

- Agudath Israel of America is the nation's largest grassroots Orthodox Jewish organization, with chapters in 36 states and more than 50 cities throughout the United States.

- National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

- The Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members. It has for many years been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

- The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world. Its membership exceeds one thousand rabbis, and it is deeply concerned with issues related to religious freedom.

- Torah Umesorah-The National Society for Hebrew Day Schools is the coordinating body for more than 600 Jewish day schools across the United States and Canada.

- The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is the largest Orthodox Jewish synagogue organization in North America, representing nearly one thousand congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

Each of these organizations subscribes to the view that American society is best served when religion is allowed to flourish, and that attempts to maintain an impregnable "wall of separation" between church and state – including efforts to remove any mention of God from governmental discourse – may constitute government hostility to religion and may inhibit conscientious expressions and observances of faith.

INTRODUCTION

By Jewish tradition, *Aseret Ha-Devarim* – the "Ten Declarations," known popularly today as the "Ten Commandments" (the Hebrew word "*Devarim*" used in the Torah means "Declarations" or "Utterances" and does not mean "Commandments") – were engraved on two stone tablets by God's own hand and were carried down by Moses

from atop Mount Sinai. The first two of the Commandments were, according to accepted rabbinic exegesis of the Torah, spoken by God Himself to the Children of Israel assembled at the foot of the mountain. As representatives of the faith to whom the Ten Commandments were given and who transmitted them to the rest of civilization, we certainly do not minimize their profound religious significance.

At the same time, the Ten Commandments express principles of humanity and morality that have universal application. Indeed, over the course of time – more than 3300 years since the revelation at Mount Sinai – the Ten Commandments have come to be recognized as the foundation for legal and social structures in many secular governments and societies across the globe, including our own. A governmental display of the text of the Ten Commandments or of an easily understood symbol of these historic declarations does not, therefore, violate any federal constitutional guarantee. It conveys to the reasonable observer a message that is not only religious but is also historical, moral and secular.

ARGUMENT

I.

A RELIGIOUS SYMBOL MAY ALSO HAVE SECULAR SIGNIFICANCE

Many religious symbols have acquired, over the course of time, secular meaning in addition to their original religious message. The religious significance of such multi-faceted symbols to conscientious believers is not diminished when societies, groups or individuals – including those who do not subscribe to religious dogma – assign to these

religious symbols secular values that are meaningful to non-believers.

A Jewish religious symbol that has been found by several Justices of this Court to fit in this category is the menorah. In *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 613-614 (1989), Justice Blackmun noted in his plurality opinion:

> The menorah, one must recognize, is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah's message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.

Earlier in his *Allegheny County* plurality opinion, Justice Blackmun accorded this dual significance to the Jewish religious holiday of Chanukah (492 U.S. at 585):

> Just as some Americans celebrate Christmas without regard to its religious significance, some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity, and "as a cultural or national event, rather than as a specifically religious event."

The Court's decision in the *Allegheny County* case permitted a governmental display of the menorah – a symbol that originated in religious observance and has religious significance to observant Jews to this day. The menorah's additional dimension – the message that it and the Chanukah holiday convey to those who do not observe the rituals of the Jewish faith – was emphasized by Justice Blackmun in his

opinion. The Ten Commandments are similarly rooted in religious faith but have taken on additional non-religious facets that make its display constitutionally permissible.

II.

IN ADDITION TO THEIR RELIGIOUS DIMENSION THE TEN COMMANDMENTS SYMBOLIZE THE HISTORIC ORIGINS OF SOCIETIES GOVERNED BY LAW

The court of appeals' opinion in this case observed in terms that are so indisputable that they are subject to judicial notice (351 F.3d at 181):

> Even those who would see the decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country. That extraordinary influence has been repeatedly acknowledged by the Supreme Court and detailed by scholars. Equally so is its influence upon ethics and the ideal of a just society.

In his dissenting opinion in *Stone v. Graham*, 449 U.S. 39, 45 (1981), then-Associate Justice Rehnquist said that it was "undeniable" that "the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World." Dissenting (with Justices Scalia and Thomas) from the denial of certiorari, Chief Justice Rehnquist again noted that "the Commandments have secular significance as well, because they have made a

substantial contribution to our secular legal codes." He quoted the opinion of the Seventh Circuit that had acknowledged – even while finding a Ten Commandments display to be unconstitutional – that "the text of the Ten Commandments no doubt has played a role in the secular development of our society . . . ." *Books v. Elkhart,* 235 F.3d 292, 302 (7th Cir. 2000), *cert. denied,* 532 U.S. 1058 (2001).

In a Colorado case concerning a Ten Commandments monument on the grounds of the State Capitol in Denver, "[a]ll the experts who testified at trial agreed that, at least to the extent that the Commandments established ethical or moral principles, they were expressions of universal standards of behavior common to all western societies. It was agreed that these moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution." *State v. Freedom From Religion Foundation, Inc.,* 898 P.2d 1013, 1024 (Colo. 1995), *cert. denied,* 516 U.S. 1111 (1996).

Indeed, the ubiquitous acceptance of the Ten Commandments by all members of society, including even non-believers, led to a seemingly anomalous rabbinic regulation regarding the daily prayer service. Although the Ten Commandments had been recited daily in the Temple (Mishna *Tamid* 5:1), the rabbis directed that their recitation be omitted from the prescribed service after the Temple was destroyed because the "heretics" would infer erroneously that only the Ten Commandments had been divinely given (Talmud *Berachot* 12a). This account attests to the universal acceptance of the Ten Commandments even among the "heretics" of two thousand years ago.

III.

GOVERNMENTAL DISPLAYS ARE A PARTICULARLY NON-COERCIVE FORM OF STATE ACTION

In considering the merits of the constitutional challenge made in this case and in its companion, *McCreary County v. American Civil Liberties Union of Kentucky,* No. 03-1693, the Court should bear in mind that of the range of potential state actions in the sphere of religion, governmental displays are among the least likely to be coercive. In situations such as were presented in *Lee v. Weisman,* 505 U.S. 577 (1992), and *Santa Fe Indep. School Dist. v. Doe,* 530 U.S. 290 (2000), apparently voluntary participation in governmentally sponsored religious activity might pressure non-adherents to a religious faith – particularly school-age children -- to join in religious activity. Opponents of public financing of religiously affiliated institutions also contend that participants in the programs of such institutions might be proselytized or otherwise coerced into involuntary participation in religious exercises.

But these dangers are simply not present when government does no more than erect a display. Those who find the display offensive or who disagree with its message are, of course, free to look away. No one is pressured to say a prayer or to engage in any other form of religious observance by the mere presence of a display of the Ten Commandments. Justice Kennedy made this point succinctly in his separate opinion in *Allegheny County v. Greater Pittsburgh ACLU,* 492 U.S. 573, 664 (1989):

> Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they

are free to do when they disagree with any other form of government speech.

The only conceivable threat that a display presents to a constitutional liberty protected by the First Amendment is one of perception – that it might appear to a reasonable observer that government is formally approving or "endorsing" the particular religion whose symbol is displayed. In neither of the cases before the Court is there any true danger of such "endorsement."

IV.

DISPLAY OF A MONUMENT OF ANY TEXT OR CONFIGURATION OF THE TEN COMMANDMENTS WITH NO ADDITIONAL "ENDORSEMENT" OF ANY PARTICULAR RELIGION IS CONSTITUTIONALLY PERMISSIBLE

Neither the record in this case nor the record in *McCreary County* supports the conclusion that the Ten Commandments display was an "endorsement" of any particular faith. To be sure, there are varying translations from the Hebrew and varying configurations of the Ten Commandments. The Catholic enumeration differs from the Jewish enumeration, and there are textual differences in the English translation of Protestant versions. Even the original Hebrew is chanted in the synagogue with different cantillations and sentence configurations at different occasions during the year.

These differences do not constitute an "endorsement" of any particular text or configuration. Obviously, if the Ten Commandments are to be displayed at all, one format must be selected for that display. Insofar as the display conveys the secondary secular message of the Ten Commandments

that we have previously discussed, the minutiae of the particular text are irrelevant. The secular theme of the display is the message that the Ten Commandments have been the historical foundation for a society based on a rule of law. Whether the Jewish enumeration of the Ten Commandments (which designate "You shall have no other gods beside me" as the beginning of the Second Commandment) or the Catholic enumeration (which begins the Second Commandment with "You shall not take the name of the Lord your God in vain") appears on the display, the secular message is the same.

Beyond the selection of a particular text, no form of "endorsement" is present in either record now before the Court. Nor is there any evidence whatever that government officials deliberately chose one text or configuration over another with the intention of endorsing a particular denomination. Such evidence of religious favoritism might, in our view, constitute impermissible "endorsement."

We also note that there was much attention paid in the decision below in this case to the context of the display. The Fifth Circuit noted that "[t]he Ten Commandments monument is part of a display of seventeen monuments, all located on grounds registered as a historical landmark, and it is carefully located between the Supreme Court Building and the Capitol Building housing the legislative and executive branches of government." 351 F.3d at 182.

Such an analysis of the context of a religious display is commanded by this Court's Establishment Clause jurisprudence. The Sixth Circuit in the *McCreary County* case went beyond these parameters, however, in requiring public officials actively to undertake special steps to secularize an otherwise non-denominational public display of the Ten Commandments.

The display in this case, as well as the displays sought to be provided by local government in *McCreary County*, satisfy the standards of the Establishment Clause of the First Amendment. This Court should affirm their constitutionality.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit in this case should be affirmed and the judgment of the Sixth Circuit in *McCreary County* should be reversed.

Of Counsel

DENNIS RAPPS
National Jewish Commission
on Law and Public Affairs
("COLPA")
1290 Avenue of the Americas
New York, NY 10104
(212) 314-6384

DAVID ZWIEBEL
MORDECHAI BISER
Agudath Israel of America
42 Broadway, 14th Floor
New York, NY 10003
(212) 797-9000

NATHAN J. DIAMENT
Union of Orthodox Jewish
Congregations of America
11 Broadway, 14th Floor
New York, NY 10004
(212) 563-4000

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
ALYZA D. LEWIN
LEWIN & LEWIN LLP
1828 L Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 828-1000

Attorneys for the Amicus Curiae

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